Nos. 581 and 582

In the Supreme Court of the United States

OCTOBER TERM, 1941

ADOLPH B. SPRECKELS, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

In the Supreme Court of the United States

OCTOBER TERM, 1941

NOS. 581 AND 582

ADOLPH B. SPRECKELS, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

Although we believe the decision below to be correct, we do not oppose the petition because of the conflict with decisions in the Second Circuit.[1]

[1] With respect to the year 1934 (No. 581) the Board of Tax Appeals held that the taxpayer was barred by limitations because an amendment to a claim for refund was filed more than three years after the last payment of the tax. The court below did not pass upon this question on the ground that it was unnecessary in view of its decision that the commissions on sales were not expenses. If this Court grants the petitions for certiorari and reverses the decision of the court below on the merits, we will request that No. 581 involving the year 1934 be remanded to the Circuit Court of Appeals for a decision on the question of limitations.

417461—41

The question presented is whether a taxpayer engaged in the business [2] of buying and selling securities and commodities is entitled to deduct commissions on sales as ordinary and necessary business expenses within the meaning of Section 23 (a) of the Revenue Act of 1934, c. 277, 48 Stat. 680, when he buys and sells for his own account. The court below held that commissions on sales in the circumstances of this case were not expenses within the meaning of Section 23 (a), but were in the nature of a capital charge to be applied against and reduce the amount of the selling price received by the taxpayer. Thus, under the court's decision, the taxpayer is not deprived of a "tax advantage" with respect to such commissions; they are simply reflected in his capital gains or losses by decreasing the amount of his taxable gain or increasing the amount of his loss, subject only to the statutory limitations dealing with such gains or losses. Cf. *Helvering* v. *Winmill*, 305 U. S. 79 (purchase commissions).

---

[2] Neither the Board of Tax Appeals nor the court below considered the question whether the taxpayer was engaged in "business" within the meaning of Section 23 (a) of the Revenue Act of 1934, when he traded for his own account. In view of the recent decisions of this Court in *Higgins* v. *Commissioner*, 312 U. S. 212; *United States* v. *Pyne*, 313 U. S. 127; and *City Bank Co.* v. *Helvering*, 313 U. S. 121, we may undertake to support the result below on the further ground that the petitioner was not engaged in "business" within the meaning of the statute.

In refusing to allow the selling commissions to be deducted as expenses the decision below is in conflict with the decisions of the United States Circuit Court of Appeals for the Second Circuit in *Winmill* v. *Commissioner*, 93 F. (2d) 494, and *Neuberger* v. *Commissioner*, 104 F. (2d) 649, reversed by this Court on other grounds, 311 U. S. 83. The decision of the court below has been followed by the Circuit Court of Appeals for the Fifth Circuit in *Comissioner* v. *Covington*, 120 F. (2d) 768, in which a petition for rehearing was denied on July 11, 1941.

Respectfully submitted.

CHARLES FAHY,
Acting Solicitor General.

SEPTEMBER 1941.

U. S. GOVERNMENT PRINTING OFFICE: 1941